COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of the Petition of MediaOne Telecommunications of Massachusetts, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic - Massachusetts, Inc.)

D.T.E. 99-42/43

REPLY BRIEF OF AT&T BROADBAND REGARDING TRANSPORT RATES FROM A MID-SPAN MEET FACILITY

Jeffrey F. Jones

Kenneth W. Salinger

Jay E. Gruber

Palmer & Dodge llp

One Beacon Street

Boston, MA 02108-3190

(617) 573-0100

Stacey Parker

AT&T Broadband

Six Campanelli Drive

Andover, MA 01810-1095

(617) 283-8290

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TRANSPORT RATES FROM A MID-SPAN MEET FACILITY

On January 12, 2001, AT&T Broadband, formerly MediaOne ("ATTB") and Verizon-Massachusetts ("Verizon") filed initial briefs on the issue of the appropriate rates for dedicated transport necessary to carry and complete local traffic when such transport is connected to a mid-span meet arrangement ("mid-span meet facility").(1) Pursuant to a hearing office notice by electronic mail on January 19, 2001, ATTB files this reply brief.

Introduction

The dedicated transport at issue carries Verizon bound traffic (traffic from AT&T local customers crossing the mid-span meet facility) from the Verizon Serving Wire Center ("SWC") in which the terminating electronics of the mid-span meet facility are located to Verizon tandems that are located in other cities and towns ("Remote Tandems").(2) It is ATTB's position that such transport is a dedicated IOF UNE and must be priced on that basis, i.e., at TELRIC. Further, ATTB contends that, even if it is not a dedicated IOF UNE, it should be priced on the basis of "cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing interconnection or network elements." 47 U.S.C. § 252(d)(1). Any greater price would violate the requirements of competitive neutrality, because such price would be greater than the cost that Verizon incurs to transport its own local traffic. Verizon argues that the dedicated transport at issue is not an IOF UNE and that, on this basis alone, it has the right to impose above-cost access rates.(3)

The filing of the January 12, 2001 initial briefs was not the first time that the parties have addressed the issue presented. Both parties filed pleadings on the issue on June 15, June 19, and August 14, 2000. In addition, there was a technical session on June 21, 2000, in which the parties' positions and various legal arguments were discussed thoroughly. As a result, in ATTB's initial brief ("ATTB Brief"), it addressed and thoroughly rebutted all the arguments that Verizon had made during those prior rounds of debate. Verizon's January 12, 2001 initial brief ("Verizon Brief") presented no new arguments. It simply repeated the arguments that ATTB had already addressed and rebutted in ATTB's initial brief. ATTB will not, therefore, repeat those arguments here. There are, however, a few isolated and subsidiary assertions or points that Verizon sought to make in its initial brief that warrant a short response. This reply brief is limited to those.

In this reply brief, ATTB addresses the following three aspects of Verizon's Brief:

Verizon's misplaced reliance on Tariff 17 in support of its various arguments;

Verizon's false claim that ATTB has made a proposal to change the financing arrangements of the mid-span meet facility; and

Verizon's confused argument regarding ATTB's alleged desire to charge Verizon switched access rates for the transport of ATTB bound calls originated by Verizon end-users.

Argument

I. VERIZON'S RELIANCE ON TARIFF NO. 17 TO SUPPORT ITS POSITION IN AN INTERCONNECTION AGREEMENT ARBITRATION IS MISPLACED.

One of the most troublesome aspects of the Verizon Brief is its repeated reliance on Tariff No. 17 to support Verizon's position in the present arbitration proceeding. See, Verizon Brief, at 5, 6, 7, and 8. Indeed, Verizon makes much of the fact that the Tariff No. 17 provisions have been "approved" by the Department. See, id., at 6, 8. For the reasons discussed below, Verizon's reliance on Tariff No. 17 is misplaced. Moreover, as also discussed below, Verizon's reliance on Tariff No. 17 raises the question of whether Verizon is negotiating this interconnection agreement in good faith.

A. The Department Should Not Permit Verizon To Avoid Its Obligations To Negotiate Appropriate Interconnection Arrangements By Relying On An "Approved" Tariff.

In its March 24, 2000 order in D.T.E. 98-57 ("March 24 Order"), the Department made clear that, not only will tariff provisions not supersede current provisions of interconnection agreements, the existence of approved tariff provisions should not hinder the free negotiation of future interconnection agreements. Id., at 20-22. The Department was well aware that Verizon may seek to use the existence of tariff provisions favorable to itself as a "default" position that will relieve it from the necessity of serious negotiation of alternative arrangements. The Department stated:

Lastly, we note that the Act provides the FCC and state commissions with authority to consider allegations that a carrier has failed to negotiate in good faith, and to impose penalties on carriers found to be in violation of its duties. Consistent with that authority, the Department will monitor whether Bell Atlantic is negotiating in good faith, or whether it is using Tariff No. 17 to avoid that obligation. We will not hesitate to use our authority to impose penalties, if necessary. For the reasons stated above, the Department refuses to strike the tariff in its entirety.

Id., at 22 (emphasis added; footnote omitted).

This case suggests that the Department's concerns were well founded. Verizon is refusing to move off of a position in an interconnection agreement negotiation that it believes is established by default in Tariff No. 17, i.e., that "[u]nbundled dedicated IOF transport is not provided with mid span meets." Tariff 17, Part B, Section 2.1.1.A.2. The Department should not permit Verizon to avoid its obligations to negotiate appropriate interconnection arrangements by relying on an "approved" tariff. (In any event, as discussed below, Verizon's position is not advanced by the Department's allowance of Section 2.1.1.A.2 to go into effect pending investigation.)

B. One Of The Principal Tariff Sections Relied Upon By Verizon Is Currently Under Investigation.

In its brief, Verizon relies in large part on Part B, Sections 2.1.1.A.2. Verizon Brief, at 5. As noted above, Section 2.1.1.A.2 states that "[u]nbundled dedicated IOF transport is not provided with mid span meets." This provision, although technically "approved," is subject to investigation in Docket D.T.E. 98-57, since it was added in Verizon's May 25, 2000, tariff filing in that docket and not considered by the Department on its merits. See, July 12, 2000, Hearing Officer Memorandum, in D.T.E. 98-57. In that docket, AT&T now vigorously opposes Section 2.1.1.A.2 on the same grounds that it opposes Verizon's position here. See, Initial Brief Of AT&T Communications Of New England, Inc. Regarding Open Tariff Provisions, at 19-23 (filed on January 12, 2001). Thus, Verizon's reliance on a contested Tariff No. 17 provision adds nothing to Verizon's case here.

C. Verizon's Use Of Tariff No. 17 Illustrates The Problems Of Using A Tariff As Precedent For An Interconnection Agreement Arbitration.

1. Part B, Section 2.1.1.B of Tariff No. 17 Was Never Actively Considered By The Department and Is Ambiguous.

Verizon also relies on Part B, Section 2.1.1.B. See, Verizon Brief, at 5 and 7, n. 9. That section states:

Unbundled dedicated IOF transport provides a transmission path within a LATA between the following locations. In addition, Intrastate-InterLATA unbundled dedicated IOF transport will be provided when all circuit end points are within the same local exchange calling area as defined in DTE MA No. 10.

1. CLEC designated TC central office premises.

2. CLEC designated collocation arrangements established within Telephone Company central offices.

3. A CLEC designated TC central office premises and a collocation arrangement established within a Telephone Company central office.

Verizon apparently interprets this provision to mean that "some form of collocation (virtual or physical) is . . . necessary for the CLEC to interconnect with the appropriate Verizon MA central office" and concludes from that interpretation that an IOF UNE cannot be accessed from a mid-span meet. Verizon Brief, at 5.

Verizon's conclusion that Section 2.1.1.B prohibits access to IOF UNEs from mid-span meets, however, is hardly self evident. A history of the tariff filings illuminates the issue. Section 2.1.1.B was part of the voluminous set of tariff provisions that was the subject of hearings in December 1999 and January 2000, briefing in February 2000 and Department decision on March 24, 2000. Buried deep in a voluminous tariff with provisions that on their face do not preclude the use of mid-span meets for accessing UNEs, Section 2.1.1.B was not challenged by any CLEC, was not litigated and was not considered by the Department. There is no reference to it in the Department's March 24 Order. Verizon, apparently concerned that Section 2.1.1.B was not sufficiently clear, filed Section 2.1.1.A.2 on May 25, 2000, which -- for the first time -- expressly prohibited access to an IOF UNE from a mid-span meet.

Verizon now contends that Section 2.1.1.B prohibits access to UNEs from mid-span meet facilities, even though it subsequently filed an additional tariff provision saying the same thing. Like the meaning of so many of the tariff provisions in the voluminous Tariff No. 17, the meaning of Section 2.1.1.B is apparently whatever Verizon will contend that it is at the time a CLEC seeks to order service under it, or - in this case - at the time that Verizon seeks to use it as precedent in an arbitration proceeding.(4) Because of the lack of consideration received by many of the provisions of Tariff No. 17 and - given the size of the tariff - the necessarily abbreviated record developed on the provisions that were considered, Tariff No. 17 is a gold mine of ambiguities and unexamined issues; it should not be relied upon as precedent in an arbitration proceeding, and Section 2.1.1.B - whatever it means - should not be relied upon in this one.(5)

2. Part E, Section 1.5 of Tariff No. 17 Was Never Actively Considered By The Department.

Verizon also relies on Part E, Section 1.5. See, Verizon Brief, at 8. That section prescribes the arrangements under which Verizon offers meet point interconnection. The tariff contemplates a range of possibilities that are not explicitly listed. Section 1.5.1.A.3. The tariff also prescribes an arrangement under which Verizon offers the transport related to meet point interconnection according to the "terms and conditions applicable to direct trunked transport as specified in DTE MA No. 15." Section 1.5.1.A.2.

Section 1.5.1.A.2 did not apparently catch the eye of any of the CLECs that were participating in Tariff No. 17. There are many possible explanations. As noted

above, the filing was voluminous and covered the entire range of wholesale services. In that context, Verizon's identification of a tariff by its number ("DTE MA No. 15") may not have alerted the reviewers to the same extent as the more descriptive term "access tariff" would have. In addition, Tariff No. 17 does not on its face limit the transport arrangements to those provided under Verizon's access tariff, since it explicitly contemplates other, albeit unidentified, arrangements. Section 1.5.1.A.3. In any event, the Department's silent "approval" of this provision - a provision that was not brought to its attention and was not considered by it - is not a justification for allowing Verizon to impose the same unreasonable term in the ATTB-Verizon interconnection agreement.(6)

D. Verizon Misuses Part E, Section 1.1.1.A in Tariff No. 17.

Verizon also relies upon Part E, Section 1.1.1.A to argue that collocation is required to access unbundled IOF. Specifically, Verizon claims that under this provision "collocation is required 'to provide for access to central office cross-connect points that may serve as a point of interconnection for the exchange of traffic with [Verizon MA], or for purposes of accessing unbundled network elements in those [Verizon MA] central offices.'" Verzion Brief, at 8 (emphasis in original), quoting Part E, Section 1.1.1.A. A quick review of Section 1.1.1.A, however, shows that Verizon has given it a meaning in its brief that is different from the meaning it has in the tariff.

Part E of Tariff No. 17 sets forth Verizon's collocation offerings. Section 1.1.1.A begins Part E and provides nothing more than a description of what collocation is. Section 1.1.1.A states simply:

Collocation provides for access to central office cross connect points that may serve as a point of interconnection for the exchange of traffic with the Telephone Company, or for purposes of accessing unbundled network elements in those Telephone Company central offices.

Section 1.1.1.A does not state that collocation is required for access to central office cross connect points. Section 1.1.1.A does not state that collocation is the only method for obtaining access to central office cross connects. Section 1.1.1.A merely states that such access can be obtained from Verizon's collocation offering.

Thus, even if it were appropriate for Verizon to rely on Tariff No. 17 to support its arbitration position (and it is not), Section 1.1.1.A does not support Verizon's arbitration position on this issue.

II. CONTRARY TO VERIZON'S CLAIM, ATTB HAS NOT MADE A PROPOSAL TO CHANGE THE FINANCING ARRANGEMENTS OF THE MID-SPAN MEET FACILITY.

In its initial brief, Verizon apparently has misconstrued ATTB's legal argument as an alternative contract proposal. Verizon suggests that ATTB is proposing to change the financial arrangement under which the mid-span meet was constructed from a jointly financed facility to one that is financed entirely by ATTB. Verizon Brief, at 10. In support of this suggestion, Verizon refers to a discussion that occurred at the June 21, 2000, technical conference, in which ATTB made the legal argument that ¶553 of the FCC's First Local Competition Order does not entitle ILEC's to prohibit access to UNEs from mid-span meets. ATTB legal argument was that ¶553 related to financial arrangements, i.e., that ¶553 requires a CLEC to pay for a mid-span meet facility if it is being used solely for the purpose of accessing UNEs. Tr. 128-129.

The June 21, 2000, transcript reflects, not an ATTB proposal, but rather a sustained and repeated attempt by Verizon representatives to force ATTB into making the proposal that Verizon now claims ATTB has made. Tr. 128-129. ATTB was not proposing that ATTB assume full financial responsibility for the mid-span meet so that it would be entitled to access UNEs from the mid-span meet. Such a proposal would be unnecessary because in the present case the mid-span meet facility is not being used solely for the purpose of ATTB's access to Verizon's UNEs; it is also being used by

Verizon for interconnection purposes.(7) ATTB's unwillingness to assume full financial responsibility for a facility that Verizon also uses is reflected in the discussion relating to the charges that ATTB would seek to impose on Verizon for its use of the mid-span meet facility if ATTB were to pay up front for the facility. Tr. 132.

In short, ATTB does not seek any change in the financial responsibilities for the mid-span meet facility to avail itself of access to UNEs under ¶553 because no such change is necessary. Where both ATTB and Verizon enjoy a benefit from the facility (for Verizon, it is interconnection; for ATTB, it is access to UNEs and for both it is the exchange of local traffic), the financial rules of ¶553 do not apply.

III. THE DEPARTMENT SHOULD DISREGARD VERIZON'S CONFUSED ARGUMENT REGARDING ATTB'S ALLEGED DESIRE TO CHARGE VERIZON SWITCHED ACCESS RATES FOR THE TRANSPORT OF ATTB BOUND CALLS ORIGINATED BY VERIZON END-USERS.

In its initial brief, in an effort to support its argument that it should be allowed to charge access rates for unbundled dedicated IOF transport, Verizon purports to point to a provision in the pending interconnection agreement between Verizon and ATTB which would allow ATTB to charge Verizon switched access rates for the transport of traffic that Verizon sends to ATTB for termination. See, Verizon Brief, at 9 ("it would be inherently unfair to allow AT&T Broadband to charge transport using Verizon-MA'' switched access rates, but require that Verizon MA charge transport [to] AT&T Broadband at UNE IOF rates"). This supposed asymmetry would result, according to Verizon, from a provision in the pending interconnection agreement, which Verizon quotes but does not identify by reference to any section of the interconnection agreement. See, Verizon Brief, at 9, n. 13.

The Department should ignore this argument of Verizon, because it is based on a misstatement of the pending interconnection agreement. Both parties now agree that the right to IOF rates under Section 11.5 of the interconnection agreement should be reciprocal. Indeed, ATTB had agreed to that principle as far back as August 14, 2000, as evidenced by the bolded language it submitted to the Department for Section 4.4.2 on that date. A copy of the language, with the original bold highlight as submitted on August 14, 2000, is attached hereto.

Conclusion

For the reasons set forth above, the Department should reject Verizon's proposal to charge access rates, and accept ATTB's proposal that Verizon charge TELRIC based IOF rates, for the transport facility at issue. The Department should also make clear that its decision regarding applicable rates applies whether the transport facility at issue ends at a tandem switch or an end office switch.

Respectfully submitted,

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Jeffrey F. Jones

Kenneth W. Salinger

Jay E. Gruber

Palmer & Dodge llp

One Beacon Street

Boston, MA 02108-3190

(617) 573-0100

Stacey Parker

AT&T Broadband

Six Campanelli Drive

Andover, MA 01810-1095

(617) 283-8290

Dated: January 30, 2001

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party on January 30, 2001.

_____

Jay E. Gruber

1. 1 As stated in ATTB's initial brief, the term "mid-span meet facility" includes the entire span that runs from ATTB's switch to a Verizon building known as a serving wire center ("SWC"), including any electronics necessary to use it for the purpose that is intended.

2. 2 Some of the Verizon bound traffic crossing the mid-span meet facility is routed by the terminating electronics in Verizon's SWC to a tandem in that SWC ("Nearest Tandem").

3. 3 In the June 21, 2000 technical session, Department Staff recognized that Verizon's position boils down to this simple proposition. See., Tr. 163, lines 10-19.

4. 4 Indeed, even regarding matters that are not directly at issue here, Verizon's interpretation of Section 2.1.1.B in its brief appears to be inconsistent with the meaning of Section 2.1.1.B as written. In its brief, Verizon interprets this provision as defining the IOF transport UNE to be limited to "a transmission path between the following locations within a LATA: (1) between Verizon MA end office premises designated by the CLEC; (2) between CLEC designated collocation arrangements established within Verizon MA central offices; or (3) between a Verizon MA end office premise designated by the CLEC and a collocation arrangement established within a Verizon MA central office." Verizon Brief, at 7, n. 9. In order to reach this interpretation in its brief, Verizon is equating "Verizon MA end office premise" with the tariffed language "TC central office premises." The term "TC" in the tariff, however, refers to all telecommunications carriers, not just Verizon. Compare, "TC" (Part A, Section 1, page 5) and ""Telephone Company" (Part A, Section 1, page 10). Moreover, Verizon introduces even more confusion into Section 2.1.1.B because it uses the term "CLEC" which is not defined anywhere in the tariff. Indeed, Ms. Stern testified in the Tariff No. 17 proceeding that Tariff No. 17 uses the term "TC" to mean "CLEC." See, Tr. 12/14/00, p. 138, lines 1-6, in D.T.E. 98-57.

5. 5 If it requires collocation in order to access IOF UNEs, Section 2.1.1.B is in violation of federal law as the Department has recognized (see, Consolidated Arbitrations (Phase 4-K), at 24-26), and the Department on its own motion should require Verizon to change it.

6. 6 Now that Part E, Section 1.5.1.A.2 has been brought to the Department's attention, the Department on its own motion should require the removal of this unreasonable tariff provision.

7. 7 That the dual purpose of the mid-span meet facility takes it out from under the financial rules of ¶553 was recognized by Department staff at the June 21, 2000, technical conference. See, Tr. 141, lines 16-20.